

IN THE MATTER OF:	:
CONSENT MARKETS, TARIFFS AND RATES - ELECTRIC	:
CONSENT MARKETS, TARIFFS AND RATES - GAS	:
CONSENT ENERGY PROJECTS - HYDRO	:
CONSENT ENERGY PROJECTS - CERTIFICATES	:
DISCUSSION ITEMS	:
STRUCK ITEMS	:

OPEN MEETING

Thursday, September 15, 2005

10:00 a.m.

1 APPEARANCES:

2 COMMISSIONERS PRESENT:

3 CHAIRMAN JOSEPH T. KELLIHER

4 COMMISSIONER NORA MEAD BROWNELL

5 COMMISSIONER SUEDEEN G. KELLY

6 SECRETARY MAGALIE R. SALAS

7

8

9

10

11

12

13

14

15

16

17

18 ALSO PRESENT:

19 JANE W. BEACH, Reporter

20

21

22

23

24

25

P R O C E E D I N G S

(10:00 a.m.)

CHAIRMAN KELLIHER: Good morning. This open meeting of the Federal Energy Regulatory Commission will come to order to consider the matters which have been duly posted in accordance with the Government in the Sunshine Act for this time and place.

Please join us in the Pledge of Allegiance.

(Pledge of Allegiance recited.)

CHAIRMAN KELLIHER: At the beginning, I'd like to take a few moments before we actually begin the meeting and turn to business, for a moment of silence to honor the victims of Hurricane Katrina.

(Moment of silence observed.)

CHAIRMAN KELLIHER: Thank you.

The Commission took prompt action, within it's limited authority, to aid the victims of Hurricane Katrina and to expedite the restoration efforts. We've relaxed certain requirements for transmission providers under the Standards of Conduct Rule.

We also acted to extend filing deadlines for affected jurisdictional companies, in certain cases that are pending before the Commission involving those companies. We certainly cannot waive statutory deadlines, however.

The real hard work, though, is being done in the

1 field by the men and women who are working to restore
2 service and to repair the damage to electric transmission
3 facilities, distribution facilities, pipelines, et cetera.

4 And I just want to restate something that I think
5 all of us have believed, that their efforts have really been
6 noble, and the restoration effort has been very impressive.

7 I know a lot of the workers down there. They've
8 lost their homes, and their families are struggling, but
9 they're putting in 12- and 16-hour days working to restore
10 service for their neighbors.

11 And there's also been thousands of workers that
12 have come from outside the region to help restore service on
13 the Gulf Coast. So I think the effort by the companies has
14 been very impressive, and also by their sister companies.

15 Now, we also stand ready to take additional steps
16 within our authority to further these restoration efforts.
17 We're watching the market very close to determine if
18 companies are trying to manipulate prices.

19 And I would remind them that we now have new
20 authority under the Energy Policy Act to prevent
21 manipulation of electricity and gas markets. Now, to help
22 keep the public informed of our efforts, we will put
23 additional steps on our web page under the "What's New"
24 section of our home page.

25 We do have a -- our home page has a dedicated

1 site for Hurricane Katrina, so you can keep up with
2 developments related to the Hurricane on our website.

3 Now, I'd like to recognize that there's a new
4 face at the table, sitting right next to Cindy and between
5 Cindy and Magali. That's John Moot, the Commission's new
6 General Counsel.

7 One of the most important decisions that a
8 Chairman can make is in his or her selection of General
9 Counsel. And I'm very happy with my encouragement of John
10 to come here and join us as General Counsel.

11 He's an excellent lawyer. He's got a great deal
12 of experience in the industry that we will bring to bear and
13 that will help us, and he's got great integrity and honesty.

14 On the last score, in the first conversation we
15 had about him coming here as General Counsel, one of the
16 first things he said is, can I tell my honest opinion to
17 your colleagues, even if it -- if I disagree with you, can I
18 express that to your colleagues? And I said, certainly,
19 because you would not be an effective General Counsel,
20 otherwise.

21 Now, John, I view as someone who is a creative
22 problem-solver, and that's something we need now, given the
23 challenges we are facing, both those presented by the Energy
24 Policy Act and some of our discretionary initiatives, and he
25 will be a strong General Counsel and I will rely on him

1 greatly.

2 John shares my commitment to improving the
3 quality of our Orders and acting to make sure our Orders
4 represent reasoned decisionmaking, and he also shares my
5 commitment to improving our track record in the courts.

6 John has a longstanding interest in policy and
7 ideas, and I told him that right here at FERC is an
8 intellectual feast, although sometimes he might want to push
9 back from the table.

10 (Laughter.)

11 CHAIRMAN KELLIHER: It's an intellectual feast.
12 From some measures, General Counsel may be the best job at
13 the Commission, other than Chairman or Commissioner, I
14 suppose.

15 John also is a graduate of the Washington College
16 of Law at American University, as is Cindy and myself, so
17 there's a new faction at FERC of Washington College of Law
18 graduates. We're not as deeply entrenched as the West
19 Virginia cabal, but --

20 (Laughter.)

21 CHAIRMAN KELLIHER: -- hopefully at some point,
22 we can rival them.

23 Now, Cindy has a new role at the Commission, and
24 I just want to commend her. She is the Director of Energy
25 Bill Implementation. She also has a night job as Principal

1 Deputy General Counsel in the General Counsel's Office, so
2 she has two jobs.

3 She's in charge of our efforts here at the
4 Commission to implement the Energy Policy Act in a speedy
5 and deliberate manner. And she has developed a plan to
6 implement the Energy Policy Act, and we are on track to meet
7 the deadlines in the Act.

8 That Bill really represents the largest single
9 piece of work that the Commission has been handed by
10 Congress at any one time, and Cindy's responsible for making
11 sure that we implement that plan and meet the deadlines, and
12 I have complete confidence in her.

13 Now, let's turn to some other items --

14 COMMISSIONER KELLY: Before you do that, I just
15 want to make two comments: First, I want you to know that
16 John has not yet disagreed with you.

17 (Laughter.)

18 CHAIRMAN KELLIHER: Thank you.

19 COMMISSIONER KELLY: And, secondly, that Cindy
20 not only has been working nights, but as our agenda will
21 show, she's been keeping us up working at nights, too, to
22 implement the Energy Policy Act. You've done a good job on
23 both scores.

24 CHAIRMAN KELLIHER: Thank you, thank you.

25 COMMISSIONER BROWNELL: I'm sorry John didn't

1 tell you, but we actually did disagree.

2 (Laughter.)

3 COMMISSIONER BROWNELL: Perhaps afterwards, we'll
4 have a little confessional.

5 (Laughter.)

6 CHAIRMAN KELLIHER: I asked them not to do it at
7 open meetings.

8 (Laughter.)

9 CHAIRMAN KELLIHER: That was the one limitation.

10 COMMISSIONER BROWNELL: I just want to add my
11 thanks to the people in the field. I've gotten some very
12 heart-rending stories, including a story written by an
13 employee of the Southern Company, that really spoke to the
14 heroism of his colleagues.

15 He was very clear to also thank the many people
16 who had come in from around the country, so we hope they
17 will continue their good work, and we're here to support
18 them in every possible way. Thanks.

19 CHAIRMAN KELLIHER: I'd like to talk about some
20 other business, before we actually get to the agenda of the
21 day. One is the Natural Gas Conference that we have
22 scheduled for October 12th.

23 Something that the Commission has done in the
24 past few years, and, in the past, what we've done is focus
25 on discrete pending policy issue like the Hackberry Policy

1 which was something that the Commission looked at three
2 years ago, and last year we looked at pricing reforms for
3 gas storage.

4 This year, we're going to have more of a higher
5 profile look at the natural gas infrastructure in the U.S.,
6 which is especially timely in the wake of Hurricane Katrina.

7 The Conference on October 12th will focus on
8 issues relating to development of natural gas pipeline
9 infrastructure, including changes that impact development,
10 regulatory impediments, financial risks, and suggestions for
11 regulatory improvement, so we are certainly open to
12 improvement in our policies.

13 The Commission is also particularly interested in
14 the state of the Gulf Coast facilities following Hurricane
15 Katrina, and what steps may need to be taken to restore and
16 upgrade pipeline infrastructure in that region.

17 At this time, I'd like to recognize some of the
18 Commission's own employees who are retiring, so I will move
19 over to the podium and we can proceed from there.

20 Now, as a new Chairman, I don't take offense at
21 some of the recent retirements. I will just step to the
22 side and draw no causal relationship between the two.

23 (Laughter.)

24 CHAIRMAN KELLIHER: So, I have no resentment
25 towards you.

1 (Laughter.)

2 CHAIRMAN KELLIHER: I honor your public service.
3 Public service is a very honorable profession. I've
4 actually spent most of my professional career in public
5 service, so I thank you for all of the time that you've put
6 in here at the Commission and perhaps at other agencies.

7 I'd just like to recognize ten individuals who
8 are retiring from the Commission, one or two of who may not
9 be here, but let me start with Terry Marshall. I'm pleased
10 to present Terry Marshall with the Commission's exemplar of
11 the Public Service Award.

12 Terry has over 41 years of federal service, with
13 16 years of those at the Commission. As the Administrative
14 Manager for the Office of Markets, Tariffs, and Rates, Terry
15 provided top-notch service to both her managers and
16 employees in the full scope of all administrative matters.

17 She was instrumental in assisting the Director in
18 melding the administrative policies and processes of four
19 different offices when OMTR was established a few years ago.
20 She was also at the core of implementing two major
21 reorganizations within OMTR, helping in the evolution and
22 maturation of the office to meet an evolving energy mission.

23 On a daily basis, Terry provided invaluable
24 service to all employees within the OMTR and the Commission.
25 With that, I'm happy to present the Award.

1 (Applause.)

2 CHAIRMAN KELLIHER: Next is Nan Allen. Nan joined
3 the Commission in 1993, just after receiving a Master's of
4 Science Degree in Biology. In the Office of Energy
5 Projects, she served as Fishery Biologist, working on
6 hydropower licensing issues across the United States.

7 She retires with over 33 years of federal
8 service. Nan?

9 (Applause.)

10 CHAIRMAN KELLIHER: Next is James Griffin.
11 James, or as he is better known, J.T. Griffin, is respected
12 as one of the top authorities on cultural resource issues,
13 first for natural gas pipelines, and, most recently, for
14 hydroelectric projects within the Office of Energy Projects.

15 He will be pursuing theological studies after
16 retirement, and he retires with over 31 years of federal
17 service. James?

18 (Applause.)

19 CHAIRMAN KELLIHER: Next is Chin Lee. Dr. Lee
20 joined the Commission's Portland Regional Office in 1990,
21 bringing with him a wealth of dam safety-related experience
22 obtained during his time with the Colorado Department of
23 Natural Resources.

24 His conscientious work ethic and technical
25 expertise, earned him well-deserved respect from hydropower

1 project owners, resource agencies, and his fellow engineers,
2 and he retires with over 15 years of federal service.

3 Dr. Lee?

4 (Applause.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 Next is Janette Collum. Janette began her
2 federal career in 1964 as a clerk-stenographer. Janette's
3 entire federal service has been in the Office of the General
4 Counsel, Federal Energy Regulatory Commission, and its
5 predecessor, the Federal Power Commission. Janette retires
6 with over 40 years of federal service as a paralegal
7 specialist.

8 Janette.

9 (Applause.)

10 CHAIRMAN KELLIHER: Next is Shirley Jamison.
11 Shirley joined the Commission in 1980 as a clerk-typist in
12 the Office of the General Counsel. Other positions Shirley
13 held at OGC were legal clerk and secretary in office
14 administration. She retires with over 31 years of federal
15 service.

16 Shirley.

17 (Applause.)

18 CHAIRMAN KELLIHER: Next is Jasper Cameron.
19 Jasper joined the Commission in 1983 working in the Office
20 of the Executive Director's financial management area as an
21 accountant. He retires with over 30 years of federal
22 civilian service, and three years in the United States Army.

23 Jasper.

24 (Applause.)

25 CHAIRMAN KELLIHER: Next is John Roddy. John

1 began his law career in 1968 by clerking at the Federal
2 Power Commission and the D.C. Court of General Sessions. He
3 joined the Office of the Corporation Counsel in the District
4 and tried criminal and civil cases in D.C. Superior Court.
5 Eventually he returned to the Commission, serving as lead
6 counsel on controversial cases, including the first
7 generation of LNG plant applications and the original Alaska
8 Natural Gas Pipeline proposal. Eventually he moved into
9 enforcement in the Office of Market Oversight and
10 Investigations. John retires with over 38 years of federal
11 service.

12 John.

13 (Applause.)

14 CHAIRMAN KELLIHER: Thank you.

15 Now one significant development since our last
16 meeting in July, of course, was enactment of the Energy
17 Policy Act of 2005. That law, enacted on August 8th, was
18 one of the most important changes in the laws we administer
19 in 70 years. And I believe that virtually -- I think it's
20 actually true, literally true, that every law we administer
21 other than the Interstate Commerce Act was amended in the
22 Energy Policy Act of 2005. So it really was sweeping
23 changes for us. And we were given a lot of new
24 responsibilities, particularly in the area of electric
25 regulation, but also gas regulation.

1 I want to praise Congress for passing such a good
2 law. That bill has had a bit of an evolution and I actually
3 worked on an early version of it back in 1999. I worked
4 with Cindy on that; she had good comments. But I think this
5 law is actually the best version of it that we've seen in
6 the past few years, the past four years. And it gives the
7 Commission new tools it needs to exercise its legal
8 responsibilities.

9 I want to also praise the President for his
10 determination in pushing this legislation. And it's
11 testament to his persistence and commitment to good national
12 policy. He's been pushing this bill since 2001, and the
13 bill would not have become law without his determination.

14 I think this is a very important law, and I just
15 wanted to highlight, with some broad strokes, how I view the
16 law, how I interpret the law. It grants the Commission much
17 stronger regulatory tools, in part to assure that
18 competitive markets actually work well.

19 For example, it establishes an express
20 prohibition of market manipulation and it authorizes the
21 Commission to define that by rule or order. It gives us new
22 tools to prevent the accumulation and exercise of generation
23 market power by granting us authority to review acquisitions
24 and transfers of generation facilities, something we did not
25 have previously. It gave us significant penalty authority

1 for the first time. It provided for enforcement of
2 reliability rules. And it gave us authority to issue rules
3 and orders to assure price transparency.

4 Now the bill also shows a strong commitment to a
5 robust energy infrastructure. It has provisions regarding
6 LNG siting, clarifying our exclusive jurisdiction to
7 authorize LNG import facilities. It has new language,
8 federal backstop provisions on transmission siting. It has
9 provisions on transmission pricing reform, something the
10 Commission has been pursuing independently for 2-1/2 years.
11 It has provisions regarding gas pipelines, to provide for
12 judicial review of state decisions and development of a
13 consolidated record.

14 So to me, with the broadest strokes, what the
15 bill does, it gives us authorities we need to prevent unjust
16 and unreasonable rates in wholesale power sales, to prevent
17 undue discrimination preference in wholesale power sales and
18 transmission service, and to encourage the development of a
19 stronger energy infrastructure.

20 The new law also demonstrates significant
21 confidence in the Commission. Congress has given us, as I
22 said, a huge piece of work. They've set a lot of deadlines,
23 a lot of tight deadlines that are hard to achieve, but just
24 measuring the amount of work they've given us and the
25 discretion they've given us, the responsibility they've

1 given us, you really can't avoid the conclusion that
2 Congress has confidence in the Commission. And I believe
3 the Commission will prove itself worthy of that trust and
4 confidence and the best way we can do that is to faithfully
5 execute the law.

6 Now as I said, under Cindy's leadership, we have
7 developed a plan to implement the Energy Policy Act of 2005.
8 And I'm committed to meeting the deadlines in the law. I
9 don't want to have to explain to Congress why we missed the
10 deadlines, so if we don't miss them, the question won't be
11 asked. And we've already taken significant actions under it
12 to implement the law. Two weeks after it was enacted, the
13 Commission issued its first proposed rule regarding LNG
14 prefiling. Three weeks after the bill was enacted, we took
15 our second action. We issued the proposed rule to implement
16 the reliability provisions of the bill. We also took final
17 action with respect to a hydro project license extension.
18 And today we act to implement the PUHCA repeal provisions of
19 the bill. So we've been moving swiftly to faithfully
20 implement the Energy Policy Act of 2005.

21 Would my colleagues like to make any comment on
22 the bill at this time? I thought I'd talk about some of the
23 reliability NOPR, but if you want to talk about the bill --

24 COMMISSIONER BROWNELL: I would just like to say
25 thank you to the Staff who, I think, under your leadership,

1 has developed a very thorough and complete plan. They've
2 obviously been thinking about these issues for a long time
3 and a lot of work had been done which allowed us, I think,
4 to get those NOPRs out in a timely manner. And, frankly, I
5 think those are very robust and thorough, look forward to
6 working through it.

7 There are a lot of people who think that we will,
8 in fact, be overwhelmed by the authority and the challenges
9 that Congress has given us but I think we are up to the task
10 and I think thanks to a very strong Staff. And I thank you
11 for kind of getting us organized almost from the outset.
12 And I look forward to it, because I think this country has
13 waited a long time. And we've seen certainly up close and
14 personal in the last couple of weeks the desperate need for
15 infrastructure over the broad geography of the country and
16 the desperate needs, I think, that we will have with the
17 growing economy. So I'm excited about many of the
18 provisions, and I commend Congress for actually getting it
19 done.

20 COMMISSIONER KELLY: Thank you, Joe. I think I'd
21 just like to add -- or highlight some of the provisions of
22 the Act, consistent with your statement that Congress has
23 confidence in FERC, some of the provisions of the Act that
24 expand our authority and I think will lead to more
25 infrastructure and more reliable infrastructure in the

1 country.

2 The provisions of the Act dealing with mandatory
3 reliability standards are a significant advance for the
4 country. Giving FERC backstop siting authority in the case
5 of transmission lines across state lines is very
6 significant. Our increased merger authority is also very
7 significant. And then there was the LNG provision, which
8 confirmed our authority. And those together will enable us
9 to ensure that our infrastructure, both gas and electricity,
10 expands as necessary to meet our continuing demand on it.

11 And I would note that today, when we deal with
12 the repeal of the Public Utility Holding Company Act, we are
13 not in this proposed rulemaking getting into the companion
14 increased merger authority, but that we will be doing that
15 shortly.

16 Thanks.

17 CHAIRMAN KELLIHER: Another action, another
18 development, and I've just referenced it, the reliability
19 NOPR and I'd like to make a few comments about that and
20 invite my colleagues to join in as well. Because that was a
21 major action the Commission took and we took it before this
22 open meeting, frankly, because we didn't think we could wait
23 under the deadlines under the law. In a perfect world, you
24 take major actions in an open meeting so you can fully
25 discuss your reasons, but we can discuss our reasons now on

1 why we acted two weeks ago.

2 But the reliability NOPR was again something the
3 Commission acted on very swiftly to implement the Energy
4 Policy Act, and what we proposed were final rules to
5 establish the electric reliability organization, set
6 reliability standards, and provide for enforcement. I think
7 we all want the electric reliability organization to be a
8 strong organization, but from my point of view, the NOPR
9 must be prepared for the prospect that that won't be the
10 case and the Commission must be prepared to be a strong
11 reliability standard enforcer.

12 Now the NOPR proposes a strong enforcement role
13 for the Commission consistent with the law. And we've been
14 studying the self-regulating organization model at other
15 agencies to see how other federal agencies coordinate
16 enforcement actions with self-regulating organizations that
17 they oversee, such as the SEC oversight of the New York
18 Stock Exchange or Commodity Futures Trading Commission
19 review of enforcement actions by NYMEX and the other
20 commodities exchanges.

21 And I just wanted to comment briefly on a couple
22 aspects of the reliability NOPR. One is that the NOPR
23 permits the electric reliability organization applicant or
24 applicants to attach proposed reliability standards. Under
25 a strict reading of the bill, the bill would imply that

1 there's a two-step process: first, there's a proceeding to
2 establish an electric reliability organization, then there's
3 a subsequent proceeding to establish reliability standards.
4 And in the NOPR, we clarified that we would permit the
5 electric reliability organization applicant to attach
6 proposed reliability standards in their application to be
7 certified as an ERO. And that would permit us to start
8 review of reliability standards sooner and would permit us
9 to establish reliability standards sooner than if we took a
10 very strict reading of the language and required a two-step
11 process. So under our interpretation, we would accelerate
12 the establishment of reliability standards.

13 I just want to clarify that the law obligates the
14 Commission to review proposed reliability standards
15 individually. I want to dispel any expectation that the
16 Commission will blindly approve the Version Zero standards
17 or any other standards that are submitted and then work to
18 improve them over time. At least from my point of view, the
19 Version Zero standards fall short of the statutory
20 standards; I would expect they will be rejected or set for
21 hearing.

22 Now I'm operating under the assumption that the
23 Version Zero standards are what will be proposed, and we've
24 had some discussion about whether we should have a process
25 to start review of some of those standards in advance of the

1 ERO filing itself in order to expedite review of the
2 standards when they're under review.

3 Now one other aspect of the proposed rule is we
4 included some language on decertification of the electric
5 reliability organization, and we did that out of a faithful
6 reading of the law. The law provides for certain criteria
7 for establishment of an electric reliability organization,
8 and we interpreted those as entailing a continuing
9 obligation to meet those criteria. Otherwise, it seemed to
10 be a perverse outcome if the ERO had to meet the criteria at
11 one point in time on one day and then compliance was
12 irrelevant from that point forth. So that seemed to be a
13 perverse reading of the law. So instead we required a
14 continuing obligation to comply with the certification
15 criteria. And if they don't, there is a possibility of
16 decertification.

17 We also clarified an area that was a little
18 ambiguous -- at least provided an interpretation of an area
19 that was a little bit ambiguous in the legislation, and that
20 had to do with penalties, penalties that the electric
21 reliability organization can impose for violations. The
22 legislation is ambiguous as to whether the ERO could impose
23 higher penalties than the Commission can itself under its
24 new penalty authority. And we interpreted the new law, the
25 new penalty provisions, as applying to ERO enforcement

1 actions, once an ERO is certified and standards are
2 established. Otherwise it again would seem to be a perverse
3 outcome for these self-regulating organizations to propose
4 higher penalties than the federal government could itself.

5 So if you take a careful reading of the new
6 penalty provisions in the law, that governs violations of
7 the Federal Power Act, the reliability standards themselves
8 are set under the Federal Power Act, under the new Section
9 215. So a violation of those reliability standards under
10 the Federal Power Acts, the caps for those violations I
11 think govern ERO actions as well as the Commission actions.

12 The NOPR also helped define the role of regional
13 entities. And under the law, interconnection-wide -- the
14 law provides a rebuttable presumption for delegations of
15 authority to interconnection-wide regional entities,
16 reliability entities. Now if they were to receive delegated
17 authority, they would have authority to propose standards to
18 the ERO -- not directly to the Commission, but to the ERO,
19 and they'd have authority to enforce standards directly.

20 But I wanted to clarify that in the event there
21 is an interconnection-wide reliability entity, that the
22 standards that they propose ultimately would be ERO
23 standards, since it's the ERO, not the regional entity that
24 would be the applicant to the Commission.

25 Now outside an interconnection, there is no

1 rebuttable presumption in favor of delegation and the burden
2 is on the applicant to demonstrate that they meet the
3 standards in the law. And in those regional entities, other
4 than the interconnection-wide bodies, the role of the
5 regional entity would be limited to an enforcement role.

6 And just one last comment. I just want to
7 observe that there are certain U.S.-Canada bilateral
8 principles that have been established, and the Commission
9 was encouraged to consider those in the proposed rule. The
10 proposed rule does include many of the bilateral principles
11 and it seeks comment and asks questions on the remainder.

12 And with that I'll end my comments and invite my
13 colleagues to comment on the proposed rule, if they like.

14 COMMISSIONER BROWNELL: I would just like to join
15 you in your message that the intention is not to codify the
16 status quo, that when we look at the Blackout Report and we
17 look at the continued lack of progress frankly since the
18 Blackout Report, I think Congress has sent a very strong
19 message that they want an independent ERO and they want to
20 raise the bar on the standards so that we can assure the
21 people of this country that reliability is our first and
22 foremost priority.

23

24

25

1 When you look at the nexus between reliability
2 and security -- and we don't talk much about that, but I
3 think it's critically important, as we recognize the
4 vulnerabilities to all kinds of externalities -- that we
5 look at the importance of those standards in a very new way.

6 I think it is particularly important to examine
7 what the Blackout Report said, for example, about the
8 regional entities, and their role in not, in fact, having
9 strong reliability standards and enforcement in the regions.

10 I also think it's important to recognize that
11 whatever number of delegations there are -- and I think we
12 should take our time as we look at that -- that we need to
13 harmonize those standards. Different standards in different
14 situations, are very confusing for the industry. They add
15 cost in terms of operator training, in terms of development
16 of technologies.

17 So I think that we need to step back from our
18 parochial views of the world, to say mine are different,
19 mine are better, yours are worse, and say, where do we
20 really need to be different because of the physical nature
21 of the system? I'm hoping that discipline will be brought
22 to the discussion.

23 I also commend the new leadership at NERC. We've
24 met with the leadership, and I think that they're looking at
25 restructuring their own organization, with an eye towards

1 independence and engineering excellence. We look forward to
2 working with them as they evolve into what is a very
3 important role. Thanks.

4 COMMISSIONER KELLY: And I would like to stress
5 that the approach that's been taken to reliability in the
6 past, has been a regional approach. Different reliability
7 councils have different approaches to standards and applying
8 those standards.

9 It's particularly relevant in the West, and since
10 I've been in the West and been familiar with how WEC
11 functions, I'm thinking, in large part, about them.

12 Our view of reliability is going to change, and
13 it's not going to be reliability standards varying from
14 region to region. That's not to say that we don't want to
15 hear from the regions and WEC, in particular, that standards
16 need to be different.

17 But what we'll be focusing on is why standards
18 need to be different, not because the West is the West, but
19 because there are long lines in the West, and maybe
20 standards need to be different for long lines in the West.

21 Well, if that's true, then standards probably
22 need to be different for long lines in the East, and so I
23 would anticipate that the approach that we are going to
24 take, is to look at the country as a whole, and as Nora
25 mentioned, look at the physical characteristics of the

1 system in setting standards, not at the regional
2 characteristics based on a history of the regions having
3 individual and separate responsibilities for the reliability
4 of their systems.

5 And also, I'm cognizant of the fact that there is
6 a rebuttable presumption in the statute, a rebuttable
7 presumption provision in the statute, but in my
8 interpretation of the statute, that doesn't equate to our
9 being a rubber stamp.

10 So I do not anticipate that the Commission will
11 be a rubber stamp, but will be very vigilant at looking at
12 the basis under which the standards -- the basis on which
13 these standards are proposed, and whether -- independently,
14 evaluate whether they accomplish the goals that Congress
15 wants to have accomplished.

16 CHAIRMAN KELLIHER: Thank you. Let me make some
17 short comments on Notational Orders. As I indicated at the
18 end of the last meeting, in the future, we anticipate doing
19 more of our work notationally, as part of our movement to a
20 monthly meeting.

21 And I'd like to take this opportunity to commend
22 the Commission Staff for their hard work since the July
23 meeting. Over that period, we have issued a total of 137
24 Notational Orders since the July open meeting, which I think
25 is pretty impressive.

1 This is only possible, though, due to the hard
2 work of the Commission Staff and the efforts of my
3 colleagues, Nora and Sudeen, their Staffs, and my personal
4 Staff as well.

5 And I just want to remind everyone that Teddy
6 Roosevelt said the best job in life is one where you can
7 work hard at work worth doing, and we've demonstrated that
8 in August.

9 Let me make some short comments on some of the
10 significant Notationals of the 137. Two of them I just
11 referenced, the LNG proposed rule and the reliability
12 proposed rule.

13 Another one, though, perhaps hasn't gotten as
14 much attention, and that's an Order regarding California
15 refunds that we issued on August 8th, I believe. One of my
16 top priorities as Chairman, is to accelerate the California
17 refund proceeding.

18 And we have that not only as a stated goal, but
19 we are actually acting in that direction, as reflected by
20 the August 8th Order and also a Technical Conference we held
21 on August 25th, so it's an area where we are acting to
22 achieve that goal.

23 Now, the August 8th Order expedited the refund
24 process by establishing a framework for submission of
25 filings that power sellers need to make to demonstrate

1 mitigated revenue was below cost incurred to sell power to
2 California, and by shortening previously established
3 deadlines.

4 So that Order reflects our commitment to
5 accelerating the California refund proceeding.

6 Two other significant Notationals, just briefly
7 mentioning, the El Paso Order, we issued a Notational which
8 was a full Section 4 rate case involving El Paso. And it
9 was a proceeding that entailed both new rates and new
10 services.

11 That was notable because we don't do that many
12 full Section 4 rate cases. El Paso hadn't been before the
13 Commission with a rate case in a number of years, and this
14 was a major rate case involving a lot of customers.

15 Another final significant Notational we acted on,
16 was the Northwest Pipeline Order, which granted Northwest
17 authority to abandon 268 miles of pipeline as a result of
18 DOT corrective action, and to construct 79 miles of
19 replacement pipe.

20 So, we were busy, and we are doing an increasing
21 amount of our work notationally.

22 One final comment, before we get to the work of
23 the day, is regarding issuance of Orders. I'd just like to
24 announce that as part of our effort to keep the public
25 informed of our actions in an expedited manner, it will be

1 our goal to issue a series of Orders shortly after the
2 conclusion of each public meeting.

3 We are moving to see if we can accelerate and
4 improve the timely issuance of our Orders, so that we'll
5 issue more at the front end of the five-day goal that we
6 shoot for currently.

7 With that, I will make one last comment before we
8 turn to business, and that's just to note how very few
9 strikes we have on this meeting. I think we have a grand
10 total of four strikes, two of which regard the TAPS Quality
11 Bank proceeding, one of which was an Exelon Order that was
12 struck because the parties' settlement is imminent,
13 apparently, and the a fourth was a Northwest Pipeline Order
14 that we actually issued notationally before this meeting.

15 So, we had a grand total of four strikes, one of
16 which we've already acted on, two of which are related to
17 TAPS. So that is pretty good.

18 Now, I will turn to the Secretary and ask that we
19 begin the consent agenda. Madam Secretary?

20 SECRETARY SALAS: Good morning, Mr. Chairman and
21 Commissioners. The following items have been struck from
22 the agenda since the issuance of the Sunshine Notice on
23 September 8; they are: E-25, G-1, G-12, and C-1.

24 Your consent agenda for this morning is as
25 follows: Electric Items - E-3, 5, 6, 8, 9, 11, 12, 14, 15,

1 17, 18, 19, 20, 22, 26, 28, 29, 31, 32, 35, 36, 38, 39, 40,
2 41, 42, 43, and 44.

3 Gas Items: G-2, 3, 4, 5, 6, 7, 8, 10, and 11.

4 Hydro Items: H-1.

5 Certificates: C-2, 3, and 5.

6 The specific votes for some of these items are as
7 follows: G-2, Commissioner Brownell concurring, with a
8 separate statement; G-7, Commissioner Brownell dissenting,
9 with a separate statement; G-10, Commissioner Brownell
10 concurring, with a separate statement; and G-11,
11 Commissioner Kelly dissenting, in part, with a separate
12 statement.

13 And Commissioner Brownell votes first this
14 morning.

15 COMMISSIONER BROWNELL: Aye, noting my
16 concurrence on G-2, my dissent on G-7, and my concurrence on
17 G-10.

18 COMMISSIONER KELLY: Aye, noting my dissent in G-
19 11, and noting the fact that I have not been recused from
20 any cases on this agenda.

21 (Laughter.)

22 CHAIRMAN KELLIHER: Aye.

23 SECRETARY SALAS: The first item for discussion
24 this morning is E-1. This is a rulemaking proceeding on
25 Preventing Undue Discrimination or Preference in

1 Transmission Service.

2 It is a presentation by Dan Hedberg and David
3 Withnell.

4 MR. HEDBERG: Good morning. In this Draft Notice
5 of Inquiry, the Commission is seeking comment on whether its
6 pro forma open access transmission tariff, or OATT, and the
7 OATTs of public utilities, need reform in light of the
8 changes in the electric utility industry since the
9 establishment of the pro forma OATT in Order Number 888.

10 In Order 888, the Commission determined that
11 nondiscriminatory open access transmission service was a
12 critical component of the successful transition to
13 competitive wholesale markets.

14 While Order Number 888 set the foundation upon
15 which to attain competitive wholesale markets, the
16 Commission subsequently recognized in Order Number 2000 and
17 other Orders, that Order Number 888 did not eliminate the
18 potential to engage in undue discrimination and preference
19 in the provision of transmission service and that the
20 Commission intended to take further steps.

21 The Commission's preliminary view is that reforms
22 to the pro forma OATT, are necessary to prevent undue
23 discrimination and preference in the provision of interstate
24 transmission service.

25 The Commission is interested in receiving

1 comments describing specific enhancements that are needed to
2 1) remedy any undue discriminatory or preferential
3 application of the pro forma OATT, or, 2) improve the
4 clarity of the pro forma OATT in the individual public
5 utility OATTs, in order to more readily identify violations
6 and facilitate compliance.

7 In particular, the Commission is seeking comment
8 on such topics as: Are there remedies other than structural
9 separation, that would adequately address undue
10 discrimination? Should reforms to the Commission's pricing
11 policies be considered as part of OATT reform? Should
12 changes be made to various services required under Order
13 Number 888? Should the obligations of public utility
14 transmission providers, be better defined, and, should there
15 be specific penalty charges for violations of the tariff
16 provisions?

17 In addition, the Commission is seeking comments
18 on how best to implement the newly-established Section
19 211(a) of the Federal Power Act, concerning the provision of
20 open access transmission service by unregulated transmitting
21 utilities. Thank you.

22 COMMISSIONER BROWNELL: I just commend you, Mr.
23 Chairman, for actually initiating this, I think, about an
24 hour and a half after you got here.

25 (Laughter.)

1 COMMISSIONER BROWNELL: I believe this actually
2 could change the world. I would like to see the
3 participants be really clear in their response to this in
4 terms of what their recommendations are, what we might have
5 missed.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 We've been talking about the need for reform of
2 888 since 888 was introduced. Every day we hear the
3 challenges that people face in terms of discrimination. And
4 I think to end the uncertainty in the industry of what a
5 restructured U.S. industry is going to be when it grows up -
6 - which I'm hoping is some time in the not too distant
7 future -- I think we need to get this right this time, as
8 difficult as that may be in terms of having people to not
9 operate in the way they've operated for 50 years. That's
10 difficult. That's challenging. But I don't think it
11 jeopardizes anybody's existing business model.

12 So I look forward to working on this. I hope we
13 can move quickly, because I know these take a long time, but
14 I don't think we have a long time.

15 Thanks.

16 COMMISSIONER KELLY: Thank you, Joe. I have four
17 points that I'd like to make about the NOPR.

18 My first point, and this is particularly directed
19 to my friends in the west, I want it to be clear that this
20 is not standard market design. What we're proposing today
21 is not a sweeping change in the industry. We want to make
22 sure, rather, that the 888 open access transmission tariff
23 is as good as it can be.

24 One of the primary goals in issuing Order 888 was
25 to ensure that where transmission owners provide

1 transmission service to others, it's comparable to the
2 service they provide to themselves and their affiliates.
3 And that's one of the major goals of this NOPR.

4 My second point is that -- I shouldn't say NOPR,
5 our NOI -- today's NOI is not a departure from the goals of
6 888; rather, it's an extension of them to attempt to address
7 undue discrimination. We now have nearly a decade of
8 experience with the original pro forma OATT, and that's
9 enough experience to start looking at whether any tune-ups
10 are required. And that's the bulk of what we're doing here
11 today.

12 Now that's not to say that the pro forma OATT
13 hasn't been a high achiever in its 10 year life. It has
14 enhanced open access and it has been a key enabler of the
15 progress that the country has made in bringing the benefits
16 of competitive wholesale electricity supply to the public.
17 On the other hand, we need to note that over that same
18 period of time, investment in the nation's transmission
19 system has lagged, and lagged significantly. So the same
20 order that helped to open up competition hasn't helped to
21 increase transmission investment.

22 And so while many factors have probably
23 contributed to the low level of investment in transmission
24 infrastructure, it's reasonable to assume that some aspect
25 of the pro forma OATT may have played a role as well, or

1 could be improved to enhance the investment in transmission
2 and encourage it.

3 And so the third point that I want to emphasize
4 is that, among other things that this notice explores, is it
5 asks questions that are intended to address the possibility
6 that the OATT could do a better job of supporting
7 investments in the transmission grid. And I hope that we
8 see thoughtful comments on that topic in response, also
9 noting however that there is a new provision that the Energy
10 Policy Act gave to FERC to look specifically at incentives
11 for transmission investment, and Staff is proceeding at the
12 direction of Joe to develop a policy there as well. But
13 nevertheless, we also ask the question in this NOI.

14 And then the fourth issue I wanted to highlight
15 is ancillary services and, in particular, reactive power
16 service. Over the past few years, reactive power has become
17 a significant issue. Merchant generators, for example, both
18 inside and outside RTOs, have begun receiving separate
19 payments for reactive power that they provide.

20 Now the Commission has a broad policy for pricing
21 such services, but we have not provided detailed guidance.
22 We have a White Paper on reactive power, and the NOI asks
23 the question whether, to the extent the OATT is implicated
24 in the provision and pricing of reactive power, we should do
25 things with more specificity.

1 I want to acknowledge the efforts of the industry
2 in settling many reactive power issues, and I think that we
3 could be more helpful to them in their attempts to settle
4 this issue. For example, I understand that the same
5 questions return again and again: how they account for heat
6 losses, whether nameplate capacity should be the deciding
7 factor, et cetera. So I hope that we will receive and I
8 encourage comments on the reactive power topic to help move
9 us forward.

10 And just in summary I support the NOI and thank
11 you, Joe, for your leadership on this. And I do believe,
12 along with Nora, that it will change the industry and make
13 improvements for the public.

14 CHAIRMAN KELLIHER: I hope so. Thank you.

15 I want to thank my colleagues for their comments
16 and also thank them for their work on this NOI. This was
17 truly a group effort and all three offices worked hand-in-
18 glove on it.

19 The OATT reform as E-1s, Appalachian, suggests,
20 is one of my top priorities as Chairman. And I just wanted
21 to elaborate on what my colleagues said, at least from my
22 point of view, why we're acting today. It really starts
23 with first principles. Under the Federal Power Act, we have
24 a legal duty to prevent undue discrimination preference in
25 transmission service. That was the purpose of Order 888 and

1 the OATT itself.

2 Now the OATT has been tremendous success, it's
3 promoted wholesale competition, it's encouraged very
4 significant generation entry in many regions. But, as
5 Suedeen mentioned, the OATT was issued nearly a decade ago
6 and a lot has changed since then, a lot has changed in the
7 industry structure. And in part because of those changes,
8 the time has come to reform the OATT.

9 Now the OATT is very significant. It really is
10 the underpinning of wholesale competitive markets,
11 particularly outside RTO and ISO regions. It's the highway,
12 it's the foundation for competitive markets outside the RTO
13 and ISO regions.

14 Now the Commission has concluded in the past that
15 the OATT no longer prevents undue discrimination and
16 preference. That conclusion was reached as long as five
17 years ago in Order 2000, the RTO order. So this is not --
18 we are making a preliminary finding along the same lines but
19 that is something the Commission has actually held fairly
20 strongly going back five years. I think what we're really
21 doing here today is picking up where the Commission left off
22 five years ago with the SMD proposed rule.

23 Now the Notice of Inquiry makes a preliminary
24 finding that the OATT does not prevent undue discrimination
25 and preference, and it asks a host of questions on various

1 aspects of the OATT, some of which are areas that generators
2 and transmission customers have been complaining about for
3 many years, such as transmission pricing, the obligation to
4 expand capacity, joint transmission planning and joint
5 ownership, rollover rights, imbalances, and other issues.
6 And we asked a lot of questions in those areas.

7 Now I also want to specifically comment, note,
8 that we asked for comment on the implementation of Section
9 1231 of the Energy Policy Act of 2005, which authorizes the
10 Commission to order open access by unregulated transmitting
11 utilities by rule or order. And by asking for comment, and
12 of course this in the NOI, that reflects our commitment to
13 faithfully execute the new law.

14 Now one problem frankly with the OATT is the lack
15 of prescription. Public utilities have come to differing
16 interpretations of their OATTs and differing conclusions
17 about what is necessary to comply with the Commission's
18 rules. And the ATC calculation is one example of that lack
19 of prescription. The ACT calculation really is at the heart
20 of the OATT, because it determines how much transmission
21 capacity has to be made available for open access, yet the
22 Commission has allowed public utilities, jurisdictional
23 utilities to choose whichever ATC calculation methodology
24 they prefer.

25 There was a NERC long-term ACT report that was

1 issued in May, I believe -- well, it was issued in the
2 spring -- and it pointed out a bewildering variety of
3 methodologies. Given the lack of prescription, it makes it
4 hard to determine compliance, it makes it hard to identify
5 violations. Compliance with the OATT should not be elusive.
6 I think a greater prescription may help assure compliance
7 and make it easier for the Commission to identify
8 violations.

9 Now the goal of this Notice of Inquiry in this
10 proceeding is very clear, it's spelled out in the title:
11 Preventing Undue Discrimination and Preference in
12 Transmission Service. We are not talking about market
13 design, we are not talking about restructuring, we're
14 talking about preventing undue discrimination and
15 preference.

16 Now from my point of view personally, I've
17 frankly come to the conclusion that OATT reform is
18 necessary, so on that threshold I guess it's more than
19 preliminary for me, speaking for myself. Although I'm
20 convinced of the need for reform, I'm not convinced of the
21 extent of necessary reform. To me, the Notice of Inquiry
22 and the responses to it will be dispositive, at least from
23 my point of view, on the extent of reforms that are
24 necessary. So given the importance of the NOI to me, I
25 encourage interested parties to submit very high-quality

1 comments, because they will be read and we will rely on
2 them.

3 I'm glad we're taking the first step in this
4 direction. I hope we can take the last step in due course.
5 It is a top priority for me. So I also support the order
6 and I thank my colleagues for their hard work.

7 Madam Secretary?

8 COMMISSIONER KELLY: Aye.

9 COMMISSIONER BROWNELL: Aye.

10 CHAIRMAN KELLIHER: Aye.

11 SECRETARY SALAS: The next item for discussion
12 today is E-2. This is a rulemaking proceeding concerning
13 the authorization by the Commission to hold interlocking
14 positions, and it's a presentation by Melissa Mitchell and
15 Jim Akers.

16

17

18

19

20

21

22

23

24

25

1 MS. MITCHELL: Good morning. E-2 is a Draft
2 Final Rule, following a Notice of Proposed Rulemaking issued
3 in April of this year, regarding interlocking positions.
4 The Final Rule clarifies the requirements of Section 305(b)
5 of the Federal Power Act and Part 45 of the Commission's
6 Regulations, and makes the Regulations consistent with the
7 statutory intent of Section 305(b) of the Federal Power Act.

8 Section 305(b) mandates that applicants must seek
9 Commission approval prior to holding interlocking positions.
10 The statute serves to prevent conflicts of interest and
11 competitive abuses.

12 The Regulations will require that individuals
13 apply for and receive authorization to hold interlocking
14 positions before holding such positions. The Commission
15 will automatically deny all late-filed applications for
16 authorization to hold interlocking positions.

17 Also, Section 45.9 of the Commission's
18 Regulations will require that the individual seeking
19 automatic authorization, must file their informational
20 reports with the Commission before they may be automatically
21 authorized.

22 The Final Rule explains that the Commission no
23 longer intends to grant waivers of the full requirements of
24 Part 45 in Commission Orders granting market-based rate
25 authority.

1 Persons seeking to hold interlocking positions,
2 will be required henceforth to comply with the full
3 requirements of Part 45 of the Commission's Regulations.

4 Finally, the Final Rule amends the Regulations to
5 provide that, absent Commission action within 60 days of
6 filing a completed application to hold interlocking
7 positions, an application will be deemed granted.

8 We'd be happy to answer any questions you have.

9 COMMISSIONER BROWNELL: Joe, I cede my time to
10 you.

11 (Laughter.)

12 COMMISSIONER KELLY: I, likewise think that Joe
13 will likely say, ah, that used to be said. I want to
14 emphasize, however, that I fully agree with the Final Rule.

15 CHAIRMAN KELLIHER: Thank you. I will observe
16 that the courts recognized that when Congress wrote Section
17 305 of the Federal Power Act, that the Congress demonstrated
18 a near obsession with interlocking directorates, and I try
19 to be faithful to the law, so --

20 (Laughter.)

21 CHAIRMAN KELLIHER: I'm glad we're taking this
22 action today. The E-2 adopts the Final Rule concerning
23 authorization to hold interlocking directorates, and, as
24 Staff has just explained, the Final Rule clarifies that
25 applications must be filed and Commission authorization

1 granted, before individuals may serve in interlocking
2 positions.

3 Now, for some, up to this point, meeting the FPA
4 requirements in this area, has been a casual afterthought,
5 frankly. With today's Final Rule, there should be no
6 question, no doubt, that the Commission takes compliance
7 seriously.

8 Now, it's important to note that the Commission's
9 action in this Final Rule to require preapproval, simply
10 aligns our Regulations with the plain language of the
11 statute, to make Section 305(b), as the U.S. Court of
12 Appeals for the D.C. Circuit has described, prophylactic in
13 nature.

14 We have not imposed new requirements on corporate
15 directors, only corrective language in the Regulations that
16 was inconsistent with the plain meaning of the Federal Power
17 Act.

18 Now, the only new requirement in this Final Rule,
19 is one that the Commission imposes on itself. After
20 considering commenters' concerns and the views of my
21 colleagues, we imposed a requirement in this Final Rule,
22 that the Commission must take action within 60 days on a
23 completed application, or the application is deemed granted.

24 And for these reasons, I support the Final Rule.
25 Ready to vote?

1 COMMISSIONER BROWNELL: Aye

2 COMMISSIONER KELLY: Aye.

3 CHAIRMAN KELLIHER: Aye.

4 Now, one last comment: Thank you for your work
5 in this area. I think this was a good final rule, and I
6 want to thank the OATT team that has left the building, or
7 at least left the room.

8 (Laughter.)

9 CHAIRMAN KELLIHER: But I wanted to go on record
10 on that. I think the NOI that we just voted on, was also a
11 very good piece of work, so I thank Dan and Dave and their
12 team members, and I apologize for not doing it to their
13 faces. I hope they are watching in their offices right now.
14 Thank you for your labors.

15 SECRETARY SALAS: The next item for discussion is
16 E-4, Sea Breeze Juan de Fuca Cable, L.P., and this is a
17 presentation by Ailenn Roder, Aaron Bloom, Edward Ristway,
18 and Deborah Leahy.

19 MS. RODER: Good morning, Mr. Chairman and
20 Commissioners Brownell and Kelly. E-4 is a Draft Order
21 approving negotiated rate authority, pursuant to Sections
22 205 and 202(e) of the Federal Power Act for Sea Breeze
23 Pacific Juan de Fuca Cable.

24 The proposed Sea Breeze cable is a 540 megawatt,
25 230 kilovolt, high-voltage direct transmission line that

1 will run 22 miles from a substation in Victoria, British
2 Columbia, Canada, to a BPA substation in Port Angeles,
3 Washington.

4 The expected project completion date is December
5 of 2007. E-4 grants negotiated rate authority to the first
6 merchant transmission project in the Western Interconnect.

7 The applicants state that this new transmission
8 infrastructure will bring substantial economic and
9 reliability benefits in the heavily congested Olympic
10 Peninsula in Washington and the Pacific Northwest Region.

11 E-4 analyzes the project on the basis of the ten
12 safe harbor provisions established to evaluate merchant
13 transmission projects, taking into account, the
14 circumstances in which the facts are different from those of
15 the previous merchant transmission proposals.

16 Specifically, while E-4 finds that Sea Breeze
17 meets the market monitoring and operational control
18 criteria, it also finds that under the circumstances of this
19 case, Sea Breeze does not need to do so.

20 E-4 also indicates the willingness of the
21 Commission to reconsider the remaining criteria for these
22 kinds of projects in the future. Thank you.

23 COMMISSIONER BROWNELL: Thank you. I think this
24 Order is important for a number of reasons: First and
25 foremost, it does address an infrastructure issue and new

1 opportunities for resources in the Northwest. While they
2 have been blessed with many, many years of hydropower,
3 consistently and over the past seven years, they have faced
4 some pretty serious draught conditions, so this offers up
5 the opportunity to bring in resources and to share resources
6 with our colleagues in Canada.

7 Secondly, I think it important because we are
8 signalling some flexibility in terms of how we will look at
9 merchant projects. We've continually heard over the past
10 couple of years, that there is a great deal of capital
11 that's willing and wants to invest in transmission assets,
12 particularly, but there have been enormous barriers to
13 entry.

14 Given that the economic incentives for a merchant
15 transmission-only project are reasonably pure, I think we
16 considered that, in fact, they really, while they have met
17 the criteria, do not need to turn over operational control
18 because they don't have multiple competing interests, and,
19 secondly, the need for a market monitor, is obviated by the
20 fact that their single goal will be to leverage the asset in
21 the most efficient way that they can.

22 So I'm hoping that we'll have an opportunity to
23 get comments on the criteria on this action, but also on
24 other things that we need to consider when we're looking at
25 merchant projects.

1 So I'm very excited and I'm also excited to have
2 yet one more opportunity to be working with our Canadian
3 colleagues.

4 COMMISSIONER KELLY: This application shows that
5 merchant transmission still has a viable role to play in the
6 electric industry. And it also points to the bigger issue,
7 and that is that in the job of providing transmission to the
8 country, we have multiple business models, and the coexist.

9 The do the same job, but in different ways: The
10 merchant transmission provider, the integrated investor-
11 owned utility, the independent transmission company, and
12 then the municipally-owned, federally-owned, and
13 cooperatively-owned companies.

14 Harking back to what I was talking about before,
15 the transmission incentives provision in the new Energy
16 Policy Act that we will be developing a policy on, I think
17 it is important and this case shows how important it is to
18 analyze the issues confronting each of those business models
19 and to take steps to eliminate any barriers that they may
20 have to investment.

21 So I agree with Nora, that it is appropriate to
22 look at the criteria that we have historically looked at in
23 certifying merchant transmission, and, like Nora, I hope
24 that we will get comments on this and that we can
25 incorporate those into our transmission incentive policy

1 statement.

2 CHAIRMAN KELLIHER: Thank you. This was an
3 interesting Order. I want to thank Staff for their work on
4 this. I want to start saying that at the very beginning of
5 these presentations.

6 But this was one where all three offices worked
7 very closely together, and this one changed a bit in the
8 past few days. But for some of the reasons my colleagues
9 mentioned, this Order is significant, because it authorizes
10 new infrastructure in the form of a merchant transmission
11 project in the Pacific Northwest.

12 As indicated, it's a 22-mile project that runs
13 from Victoria, British Columbia to the State of Washington.
14 This project is a reminder that the transmission grid is not
15 only interstate in nature, but international, fully
16 extending into and fully integrated with Canada and part of
17 Mexico, and perhaps increasingly integrated with Mexico over
18 time.

19 And the applicant came in and proposed to meet
20 the test that we had established in RTO regions. We've had
21 a test that we've applied in RTO and ISO regions for
22 merchant transmission projects.

23 This project is different because it's not in an
24 RTO or ISO region. Now, the applicant proposed a way to
25 meet our test, but we're doing here is signalling that we

1 are open to changing that test.

2 Now, I think there's a bit of a recognition that
3 RTOs are not necessarily going to expand in every region of
4 the country in the near future, so we encourage merchant
5 transmission. It's been a modest success so far. We would
6 like to see it be a greater success, perhaps.

7 And I think we need to lower regulatory barriers
8 to the development of merchant transmission projects outside
9 RTOs and ISOs.

10 Now, the Order finds that the project meets all
11 ten safe harbor criteria for evaluating merchant
12 transmission projects. But it recognizes that these
13 criteria were developed for merchant projects in established
14 RTO regions.

15 That's not the case here, and the Commission
16 recognizes that by stating that Sea Breeze need not turn
17 over operational control to an RTO or operate under the
18 review of a market monitor.

19 The Order is also significant because it signals
20 our willingness to reconsider criteria for merchant
21 transmission in non-RTO regions. I support the Order. I
22 thought it was an interesting one, and I think we're ready
23 to vote.

24 COMMISSIONER BROWNELL: Aye

25 COMMISSIONER KELLY: Aye.

1 CHAIRMAN KELLIHER: Aye.

2 SECRETARY SALAS: Next for discussion is M-1.

3 This is a rulemaking proceeding on the Repeal of the Public
4 Utility Holding Company Act of 1935, and the Enactment of
5 the Public Utility Holding Company Act of 2005.

6 It is a presentation by Brandon Johnson, Jim
7 Akers, Jim Guest, and Rosemary Womack.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

1 MR. JOHNSON: Good morning, Mr. Chairman,
2 Commissioners. Agenda Item M-1 is a Draft Notice of
3 Proposed Rulemaking that, pursuant to the Energy Policy Act
4 of 2005, proposes to adopt rules to implement repeal of the
5 Public Utility Holding Company Act of 1935 and the enactment
6 of the Public Utility Holding Company Act of 2005.

7 First, Sections 1264(a) through (c) of the Energy
8 Policy Act of 2005 provided each holding company and each
9 associate company, affiliate and subsidiary thereof shall
10 maintain and shall make available to the Commission such
11 books and records as the Commission determines are relevant
12 to the costs incurred by a public utility or natural gas
13 company or appropriate for the protection of public utility
14 or natural gas customers with respect to jurisdictional
15 rates.

16 Second, Section 1266(a) directs the Commission to
17 exempt from the federal access to books and records
18 requirements certain classes of entities, namely those that
19 are holding companies solely with respect to exempt
20 wholesale generators, qualifying facilities under PURPA, and
21 foreign utility companies, as well as any other persons or
22 classes of transactions that the Commission finds are not
23 relevant to the jurisdictional rates of a public utility or
24 natural gas company.

25 Third, Section 1275(b) grants the Commission the

1 authority to, at the request of certain holding company
2 systems and state commissions, review and authorize the
3 allocation of costs for non-power goods and services
4 provided by certain associate companies to public utilities
5 within the same holding company system. In addition,
6 Section 1275(d) exempts from the requirements of Section
7 1275 single state holding companies and any other classes of
8 transactions that the Commission finds are not relevant to
9 the jurisdictional rates of a public utility.

10 The draft NOPR proposes that the Commission will
11 issue final rules implementing the above provisions of the
12 Energy Policy Act of 2005 within four months of enactment,
13 as required by the Energy Policy Act of 2005 by adding a new
14 Part 366 to the Commission's regulations. The proposed
15 rules will incorporate largely without modification the
16 above provisions of the Energy Policy Act of 2005. Also,
17 with respect to the federal access to books and records
18 requirements in Section 1264, the draft NOPR proposes to
19 adopt certain accounting cost allocations, recordkeeping,
20 and related rules promulgated by the SEC for holding
21 companies. The draft NOPR also contains applications
22 procedures for obtaining the exemptions from Section 1264
23 and Section 1275.

24 Finally, the draft NOPR proposes to remove the
25 Commission's rules with respect to exempt wholesale

1 generators in Part 365 of our regulations as unnecessary in
2 light of the repeal of the Public Utility Holding Company
3 Act of 1935. The draft NOPR seeks public comments on the
4 rules proposed herein, which are due within 21 days of
5 publication in the Federal Register.

6 Thank you.

7 COMMISSIONER BROWNELL: Of the many aspects of
8 the Energy Policy Act, it's hard to say which is more
9 important or might have a greater impact on the industry,
10 but certainly this has been a long-awaited provision. And I
11 know that, on one hand, there are many people who believe
12 this offers huge opportunities -- and I am one of those --
13 but I also know there is a number of people who are
14 concerned about this change and whether, in fact, customer
15 protections will be adequately addressed, there will be
16 sufficient transparency. So I think it's important that we
17 get this right.

18 I think that the Staff has done a wonderful job
19 in articulating some of the issues we need to deal with and
20 raising issues, but I hope, once again, that the
21 participants will be disciplined in getting their comments
22 in. The decision was made by Congress, so I don't think the
23 comments need to reflect that debate. I think the comments
24 need to reflect the most affirmative and substantive way we
25 can move forward to allow the opportunities to be seen and

1 experienced while addressing the concerns that others have
2 expressed during the course of this debate.

3 COMMISSIONER KELLY: When I think about the
4 changes that the Energy Policy Act made regarding PUHCA, I
5 think of them in three categories. One, Congress repealed
6 PUHCA. Second, Congress gave broader state and federal
7 access to the books and records of holding company members.
8 And third, Congress broadened the scope of FERC's Section
9 203 merger authority, including widening the area of
10 acquisitions and mergers that we will review and approve,
11 and also adding a new criteria to our merger approval, and
12 that is that a proposed 203 transaction will not result in
13 cross-subsidization of a non-utility holding company or the
14 encumbrance of utility assets for the benefit of an
15 associate company unless those would otherwise be consistent
16 with the public interest.

17 This proposed rule deals with the first and
18 second category: the repeal of PUHCA, the broader state and
19 federal access to books and records of holding companies.
20 It does not deal yet -- it does not deal with the scope of
21 our Section 203 merger authority. Nevertheless, I do want
22 to focus on one provision in this NOPR that relates to our
23 Section 203 merger authority.

24 We asked -- in this NOPR we asked for comments on
25 whether, in light of the repeal of PUHCA, the Commission

1 needs to promulgate additional rules or adopt additional
2 policies to protect against inappropriate cross-
3 subsidization or encumbrances of utility assets. That is a
4 question we asked pursuant to our Section 204 and 205
5 authority, not pursuant to our 203 merger authority. We
6 will deal with that issue when we deal with our new 203
7 authority.

8 But nevertheless, even though we are not dealing
9 with Section 203, we take that statement of Congress very
10 seriously. We do have policies in place to protect against
11 cross-subsidization, but we seek comment as to whether in
12 light of the repeal of PUHCA we should change or add to
13 those existing policies. And so I hope that we do get
14 comments on that and that's one reason I wanted to highlight
15 it.

16 Thank you.

17 CHAIRMAN KELLIHER: I wanted to thank my
18 colleagues for their work on this proposed rule as well, and
19 thank the Staff for their labors. This is a 120-day item
20 for us. We have to issue final rules to implement the PUHCA
21 repeal provisions of the law within 120 days of enactment,
22 and the clock is running. This is actually a more
23 complicated matter than it appears at first blush, so I want
24 to especially commend the Staff for their work.

25 Now this proposed rule would implement the PUHCA

1 repeal provisions of the Energy Policy Act, and it
2 represents the third major action the Commission has taken
3 to implement the new law in the past month. As Suedeene has
4 noted, there are concerns, there have been some concerns
5 about what the impact of PUHCA repeal might be on consumers,
6 and I want to offer some reassurance on that score.

7 The central duty of the Commission, as expressed
8 by the D.C. Circuit 25 years ago, is to -- quote -- let me
9 rephrase that. 25 years ago, the D.C. Circuit said -- quote
10 -- "of the Commission's primary task, there is no doubt,
11 however, and that is to guard the consumer from exploitation
12 by non-competitive electric power companies." That's our
13 central charge in the area of electric regulation. And that
14 was true before PUHCA repeal, it's true after PUHCA repeal,
15 and we will honor that responsibility. And we have new and
16 better tools to actually discharge that duty.

17 At the same time Congress repealed PUHCA, it
18 granted the Commission new authority to protect consumers.
19 It established an express prohibition of market
20 manipulation, gave us new authority to prevent the
21 accumulation and exercise of generation market power, it
22 gave us significant penalty authority, it authorized us to
23 assure greater price transparency, and it required that we
24 look at cross-subsidization at the point of merger. So we
25 have those new tools and we will exercise them.

1 Now the Commission's been moving to assure a
2 smooth transition from the SEC to the Commission. I
3 personally met with SEC Chairman Cox last month and the
4 Commission Staff has had a number of meetings with the SEC
5 staff. And Chairman Cox -- I was very impressed with his
6 commitment to a smooth transition to FERC.

7 Now I just want to say I support the order and
8 I'm ready to vote.

9 COMMISSIONER BROWNELL: Aye.

10 COMMISSIONER KELLY: Aye.

11 CHAIRMAN KELLIHER: Aye.

12 SECRETARY SALAS: Next for discussion is M-2,
13 revision of rules of practice and procedure regarding issue
14 identification. It's a presentation by Carol Johnson.

15 MS. JOHNSON: Good morning. M-2 is a draft final
16 rule requiring that issues raised in pleadings and in
17 requests for rehearings be set forth in a separate section
18 entitled "statement of issues" which lists each issue in a
19 separate paragraph and references representative precedent
20 on which the movant is relying. This rule does not add any
21 substantive requirements over what is already required in
22 Commission Rules 203 and 713; however, it modifies the
23 format of the required information.

24 Commission Rule 203 already requires that
25 pleadings include the position taken by the participant and

1 the basis in law and fact for that position. Rule 713
2 requires that requests for rehearing conform to the
3 requirements for pleadings found in Rule 203. Despite these
4 requirements, the Commission has found many instances where
5 issues are not clearly presented.

6 The purpose of this rule is to revise the
7 pleading and request for rehearing formats to help ensure
8 clear issue identification. This rule will benefit the
9 movant, the Commission and other participants in
10 proceedings. Movants will be benefited because the issue
11 will be recognized and addressed by the Commission and they
12 will have preserved the issue for appeal. The Commission
13 will know exactly what issues are being raised and the
14 precedent that the movant believes supports its position on
15 the issues, better enabling the Commission to address issues
16 thoroughly and expeditiously. Lastly, other participants
17 will know which issues to address in any responsive
18 pleadings.

19 Consistent with existing Rule 2001, this rule
20 notifies movants that issues that are not presented in
21 accordance with these requirements will be deemed waived.

22 Thank you.

23 COMMISSIONER BROWNELL: Clarity. There's a novel
24 thought. I think the only people who will not benefit here
25 are those who are looking at the billable hours.

1 (Laughter.)

2 COMMISSIONER KELLY: I believe that this rule is
3 a terrific housekeeping rule that will eliminate court
4 appeals and eliminate extra Commission proceedings that
5 result from those court appeals. When Joe and I first came
6 to FERC, we talked about how surprised we were that a number
7 of remands of decisions that came back to FERC from the
8 Courts of Appeal came back to us because we had not
9 addressed an issue. And it is not our intent, the intent of
10 this Commission -- I suspect it never was the intent of any
11 preceding Commission -- to not address an issue. Rather, it
12 is because we didn't understand that there was an issue or
13 perhaps inadvertence. So with the simple of requiring that
14 all parties state what the issue is, I think, will resolve a
15 lot of inefficiency.

16 Thank you.

17 CHAIRMAN KELLIHER: I want to thank Carol for her
18 excellent presentation, and I commend that the Energy Bar
19 read this order, it's one that they should read. Otherwise,
20 issues will be deemed waived. So it's probably something
21 you should read.

22 This is a small -- and it's also a short read, so
23 it doesn't take that long. It's a small but significant
24 rulemaking. In this rule, the Commission clarifies that
25 parties need to clearly identify all issues they are raising

1 before the Commission in their pleadings. In the past
2 sometimes, we've had to deal with arguments in the courts
3 that an argument reference in a footnote was raised by a
4 party. This order is intended to prevent oblique references
5 to issues in passing that then a party could then seek
6 rehearing on.

7 This rule clarifies that parties have to clearly
8 identify all issues they raise in their pleadings, they have
9 to have a separate section entitled "statement of issues"
10 that lays out each issue in separately-enumerated
11 paragraphs, and the purpose is to ensure that the Commission
12 can identify and address all issues raised by the parties.
13 It's also intended to ensure that they can't obscure issues
14 in their pleadings. Now this rule is particularly important
15 for rehearing requests, and the rule will improve our
16 ability to respond to issues raised by parties because they
17 will be more clearly presented.

18 Now I just want to emphasize again that issues
19 not identified in the statement of issues section will be
20 deemed waived. And this approach is consistent with the
21 decision of the federal courts, of the U.S. Courts of
22 Appeals, which require that issues be raised with
23 specificity, so it's within our boundaries to issue this
24 rule.

25 Now since this is an instant, final rule that is

1 effective immediately upon publication, I would encourage
2 the Energy Bar to read it because pleadings will need to
3 conform to this requirement very soon.

4 Now this rule reflects our commitment to improve
5 the quality of the Commission orders, improve our track
6 record in courts, I support the rule. And I want to
7 specifically praise Larry Gasteiger for raising this issue
8 in the first place. I did not realize that parties could --

9 I didn't realize there would actually be debates about
10 whether a passing reference in a footnote constitutes
11 raising an issue before the Commission. And this will save
12 us the trouble of that debate in the future. So I want to
13 commend Larry for a good idea and I want to commend the
14 Staff for moving very quickly to implement it.

15 Let's vote.

16 COMMISSIONER BROWNELL: Aye.

17 COMMISSIONER KELLY: Aye.

18 CHAIRMAN KELLIHER: Aye.

19 (Pause.)

20 What we're going to have here is a discussion of
21 some items that we've already approved under the consent
22 agenda, namely, two orders dealing with gathering, G-5 and
23 G-10. Let me discuss them briefly, and my colleagues I
24 think have comments as well.

25 The first order, G-5, is rehearing of an order on

1 remand from the D.C. Circuit. In 2004, the D.C. Circuit
2 vacated Commission orders that granted a complaint by Shell
3 Offshore. In the vacated orders, the Commission had
4 reasserted jurisdiction over rates charged for gathering
5 facilities on Transco's North Padre Island gathering
6 facility. The Court held that the Commission misapplied the
7 criteria set forth in ARKLA Gathering Services.

8 In a February 2004 order, the Commission found it
9 lacked sufficient basis to reassert Natural Gas Act
10 jurisdiction or to assert jurisdiction under the Outer
11 Continental Shelf Lands Act over gathering rates and
12 services of the facilities in question. G-5 denies
13 rehearing of that earlier order.

14 Now in the related order, G-10, we're instituting
15 a Notice of Inquiry to evaluate possible changes to the
16 ARKLA test. We're undertaking that because we're interested
17 in re-evaluating both our legal authority to reassert
18 jurisdiction and policy considerations in deciding whether
19 to do so.

20 Now the Shell case is one in a series of court
21 cases where the Commission has sought to prevent monopoly
22 rents in offshore gathering. That has been the policy goal.
23 And we've suffered a number of rebuffs in the courts. Our
24 goal, I think, is pure but the courts have found that we
25 have overreached in pursuing it.

1 Now the Natural Gas Act provides that the
2 Commission has jurisdiction over interstate transportation
3 and states have jurisdiction over local distribution and
4 gathering. When Congress wrote the Natural Gas Act, there
5 was very little offshore production. As gathering
6 increasingly moved offshore and as production increasingly
7 moved offshore, a regulatory gap was created, since states
8 can't regulate offshore gathering outside state waters. The
9 Natural Gas Act makes no provision for regulation of
10 offshore gathering and offshore gathering companies are free
11 to collect monopoly rents. This has long been a problem.
12 Earlier in this year, I asked Congress to grant us clear
13 authority over offshore gathering; it did not make it into
14 the final Energy Policy Act of 2005, however.

15 Now the Commission has tried to prevent monopoly
16 rents in offshore gathering under its current legal
17 authority. It's tried different legal theories and suffered
18 a series of court defeats, and we may have actually run out
19 of theories. What the Notice of Inquiry is an attempt to
20 find out is there one theory standing. If the law permits
21 monopoly rent, perhaps it's time to change the law.

22 Now this is a particular concern in the wake of
23 Hurricane Katrina, because nearly 40 percent of all offshore
24 gas production is not operating currently and restoration of
25 production is very important to mitigating high natural gas

1 prices this winter. Allowing monopoly rents in offshore
2 gathering may actually retard restoration of offshore gas
3 production, which is so critical. I think the time has come
4 for Congress to close the regulatory gap for offshore
5 gathering and end monopoly rents in offshore gathering and
6 help expedite restoration of offshore gas production in a
7 timely manner. So I do support the order. I voted for them
8 already, but those are my reasons for voting for them.

9 COMMISSIONER BROWNELL: Thank you, Joe.

10 Perhaps ironically -- although the D.C. Circuit
11 Court's decision at issue in this case did not support
12 Commission jurisdiction to do anything about monopoly rents,
13 it did support the ability of someone to do something about
14 monopoly rents in offshore gathering.

15
16
17
18
19
20
21
22
23
24
25

1 Currently, there is a regulatory gap perhaps one
2 that rivals regulatory a gap that was fixed by Congress in
3 1934. In this case, the Court found that gathering
4 affiliate's ability to charge an exorbitant gathering rate
5 and attach any competitive conditions to its gathering
6 service, could be done for one reason only, because the
7 gathering affiliate was a recently deregulated monopolist in
8 the gathering market.

9 And that's the issue that the Commission has been
10 concerned about and that's an issue that I know the Chairman
11 has been concerned about, and I also expressed to Congress
12 when it was considering the Energy Policy Act, my position
13 that I would like to see Congress give FERC jurisdiction
14 over offshore gathering affiliates.

15 Congress is currently considering whether to pass
16 energy legislation, and I would encourage Congress to add
17 this provision to any energy legislation it might
18 promulgate. Thanks.

19 COMMISSIONER BROWNELL: I'm supporting the NOI,
20 although concurring, because I actually think we have run
21 out of theories, although, you know, hope springs eternal.

22 What I actually welcome, is a more rigorous
23 debate and record as to the extent of the abuses and
24 whether, in fact, our perception is borne out by reality.
25 We've not received -- or I haven't received a great number

1 of complaints, so I think an examination of the facts will
2 help us be in a better position to make a recommendation to
3 Congress in terms of what statutory is needed.

4 But, indeed, I think that statutory action would,
5 in fact, be needed for us to actually do anything. But I'd
6 actually like to define the problem a little more clearly,
7 because in my experience, I'm just not clear about how much
8 of a problem it actually is.

9 CHAIRMAN KELLIHER: We have had a couple of cases
10 where there have been spin-down gathering facilities, and
11 then the owner of the spun-down facility will charge a
12 gathering rate that's multiples of what the 200 or 300 mile
13 long transportation rate used to be.

14 It doesn't necessarily result in shut-in, because
15 that would -- than would be more than a monopoly rent, it
16 would seem, if you charge -- I mean, monopoly rent would be
17 up to the point of confiscating somebody's profits, and I
18 think the might have an incentive to be just on this side of
19 confiscation, so it's still profitable to operate the
20 facility.

21 But we have seen a couple of anecdotal cases.
22 We've had some Orders where a very short gathering system
23 charges a rate in multiples above a very long transportation
24 system.

25 COMMISSIONER BROWNELL: I just think we need more

1 than anecdotal cases to actually make an informed decision,
2 so this will be a good opportunity to really engender some
3 information, debate, and discussion over what needs to
4 happen. That's why I'm supporting it.

5 CHAIRMAN KELLIHER: Thank you. Any other
6 business?

7 (No response.)

8 CHAIRMAN KELLIHER: Okay, let's take a five
9 minute break and get back to work. Thank you.

10 (Whereupon, at 11:40 a.m., the Open Meeting was
11 adjourned.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25